

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2012-000406-001 DT

01/03/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

WILLIAM EDWIN DONALDSON (001)

SIMONE ANNE ATKINSON

CRAIG W PENROD

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number M-0751-2010-035149.**

Defendant-Appellant William Edwin Donaldson (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the State did not present sufficient evidence to establish that he was driving within 2 hours of the blood test. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On November 6, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); failure to drive in one lane, A.R.S. § 28-729(1); not having two head lamps, A.R.S. § 28-924(A); and no proof of insurance, A.R.S. § 28-4135(C). At the trial in this matter, Officer Jason Bayer testified he stopped Defendant at 12:05 a.m. on November 6, 2010. (R.T. of Feb. 9, 2012, at 17, 38-39, 57-58, 78.) He further testified Defendant's blood was drawn at 1:55 a.m. (*Id.* at 35.) Officer Adam Fernandez testified he was called to a traffic stop at about 11:50 p.m. on November 5, 2010. (*Id.* at 98, 101.) Criminalist Patrick Alan Kosecki testified he tested Defendant's blood sample, and the testing showed a BAC of 0.112. (*Id.* at 124.) Tina Han-away testified she was the phlebotomist who drew Defendant's blood. (R.T. of Feb. 10, 2012, at 160-61.)

After the State rested, Defendant's attorney made a motion for judgment of acquittal contending that, although Officer Bayer testified he stopped Defendant at 12:05 a.m. on November 6, Officer Fernandez testified he was called to a traffic stop at about 11:50 p.m. on November 5, thus the State had not proved Defendant's blood was drawn within 2 hours of his driving.

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(R.T. of Feb. 10, 2012, at 166–67.) The trial court denied that motion. (*Id.* at 169.) The jurors found Defendant guilty of the (A)(2) charge, but could not reach a verdict on the (A)(1) charge. (*Id.* at 255–56.) The trial court imposed sentence on the (A)(2) charge, and the State dismissed the (A)(1) charge. (*Id.* at 259–61.) On February 17, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE STATE PRESENT SUFFICIENT EVIDENCE DEFENDANT DROVE WITHIN 2 HOURS OF THE BLOOD TEST.

Defendant contends the State did not present sufficient evidence he drove within 2 hours of the blood test. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

*State v. Bearup*, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

In the present case, Officer Bayer testified he stopped Defendant at 12:05 a.m. and Defendant’s blood was drawn at 1:55 a.m. The State thus presented sufficient evidence from which the jurors could find that Defendant drove within 2 hours of the blood test. The trial court therefore correctly denied Defendant’s motion for judgment of acquittal.

In Appellant’s Opening Memorandum, he refers to Officer Bayer’s police report, but that report is not part of this Court’s record on appeal. It is the duty of counsel who raises an issue on appeal to see the appellate record contains the material to which counsel takes exception, and when matters are not included in the record on appeal, the reviewing court will presume the missing portions of the record supported the action of the trial court. *State v. Zuck*, 134 Ariz. 509, 512–13, 658 P.2d 162, 165–66 (1982). Because Defendant’s attorney had not made Officer Bayer’s police report part of the record, this Court must presume that report supported the action of the trial court.

It appears Defendant is essentially contending Officer Bayer stopped him at 11:45 p.m. or 11:50 p.m., but then changed his testimony to say he stopped him at 12:05 a.m. in order to be within the 2-hour window. The traffic citation shows, however, Defendant was driving at 12:05 a.m. Thus, Officer Bayer’s testimony was consistent with the traffic citation.

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Moreover, Defendant's expert witness, Eric Brown, testified Defendant was in the elimination stage when his blood was drawn at 1:55 a.m. (R.T. of Feb. 10, 2012, at 218–21.) Thus, if Defendant's BAC was 0.122 at 1:55 a.m., it would have been even higher than 0.122 at 11:45 p.m. or 11:50 p.m. The jurors thus had sufficient evidence to prove Defendant's BAC was in excess of 0.08 within 2 hours of when he was driving.

III. CONCLUSION.

Based on the foregoing, this Court concludes the State thus presented sufficient evidence that Defendant drove within 2 hours of the blood test, thus the trial court correctly denied Defendant's motion for judgment of acquittal.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Scottsdale Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen  
THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT

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